HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 2141 OF 2007.

Ganesh Nivrutti Marne. ..Petitioner.

Versus.

State of Maharashtra. ..Respondent.

Uday P. Warunjikar for the petitioner.

A. S. Pai, APP for the State.

CORAM: S. B. MHASE &
SMT. V.K.TAHILRAMANI,JJ.

DATE: DECEMBER 12, 2007.

P.C.

1. Heard Mr.Uday Warunjikar, learned counsel for the petitioner as well as the learned APP for the State. The accused is prosecuted for the offences punishable under sections 302, 143, 147, 148, 149, 120(B) of the IPC and Section 3(25) and 7 of the Arms Act and Section 3(1), 3(2), 3(4) of the Maharashtra Control of Organised Crime Act, 1999. Already the charge-sheet has been filed in crime no. 562 of 2006. The contention of the petitioner is that on the day when the alleged incident has taken place he was not at the place of incident, namely, at Pune, but he was at Mumbai in Mantralaya in order to see some Minister. Thus, according to the petitioner he has

not participated in the crime, and the police has unnecessarily implicated him in the crime. Mr. Uday Warunjikar submitted that since the petitioner is in custody the petitioner pointed out this aspect to the Investigating Officer, and therefore the Investigating Officer should have investigated the matter in this direction and filed a report under section 169 of the Code of Criminal Procedure, 1973 so far as the petitioner is concerned. In short, the petitioner has raised the defence of alibi and he wants to get rid of the said charge by showing to this Court that on proof of alibi the charge-sheet be quashed. We find that, in fact the defence of alibi is open to the petitioner when he is called upon to enter upon his defence during the trial. He can discharge the burden of alibi either by pointing out from the cross examination of the prosecution witnesses that he was not at the place of offence, but on the contrary, he was at different place, like Mantralya. Apart from the weapon of cross examination the petitioner is also entitled to, if so desired by him, to lead defence evidence by calling the appropriate witnesses from the Mantralaya to prove his presence in the Mantralaya. Apart from that, the trial Court will also be required to consider the distance between the place of offence and the place where the accused claims his alibical presence and the possibility of that distance

being covered at the time of commission of offence, and unless and until the accused proves that the distance is such that it was not possible for the distance to be covered or crossed over, thereby making it impossible to believe that the accused was present at two different places at one and the same time the plea of alibi is not sustainable in law. All these aspects of evidence and evaluation of evidence are disputed facts and it can be evaluated in trial. The petition under Article 226 is not a remedy in such facts and circumstances. The regular procedure of a criminal trial contemplates proof of offence and thereafter the establishment of alibi. Therefore, without trial the attempt to prove alibi is something to put the cart before the horse, which is not permissible under the law. The remedy under Article 226 of the Constitution of India is an extra-ordinary remedy, which cannot be used for by-passing the regular trials. Otherwise a plea of alibi which is often raised by the accused persons unsuccessfully can be tried by way of a petition under Article 226 of the Constitution in every matter when the plea of alibi is raised. Such practice is unknown to the criminal law. Therefore, we refrain to entertain the petition.

2. The learned counsel for the petitioner made a grievance that the record in respect of his presence in

Mantralaya, Mumbai is not a record which can be said to be of permanent maintenance, and therefore by the time the trial commences and the accused is called upon to enter on defence, the relevant documentary evidence may not be available. We find that the accused - petitioner may obtain a certified copy of the said record now and he has already obtained certain copies under the RTI Act which are annexed to the petition. The petitioner may also request the trial Judge by preferring an appropriate application to secure the necessary documents upon which he wants to rely in his defence. The law has abundantly provided the remedies to the accused persons to preserve the record and to get it produced before the trial Court. We need not to tell what are those remedies. In short, we decline to entertain the petition. The petition is hereby rejected.

(SMT. V.K.TAHILRAMANI,J.) **(S.B.MHASE, J.)**

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